UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

JENISE MARTIN,	***)***	
	)	
Plaintiff	***)***	
	)	
v.	***)***	***Docket No. 96-328-P-C***
	)	
TENNFORD WEAVING CO., INC., et al.,	***)***	
	)	
Defendants	***)***	

RECOMMENDED DECISION ON DEFENDANTS' MOTIONS FOR SUMMARY JUDGMENT

The defendants, Tennford Weaving Co., Inc. ("Tennford") and Robert Estes,[1] move separately for summary judgment on all remaining counts of the complaint. This action alleges hostile environment sexual harassment. The claims against Tennford arise under 42 U.S.C. § 2000e-5 and the Maine Human Rights Act, 5 M.R.S.A. § 4551 *et seq*. The claims against Estes arise under the Maine Human Rights Act and the Maine Civil Rights Act, 5 M.R.S.A. § 4681 *et seq.* I recommend that the court grant Tennford's motion only as to the plaintiff's claim of retaliation and her demand for punitive damages and that it grant Estes' motion in its entirety.

[1] A third defendant, Stanley Smith, has been dismissed from this action by stipulation. Docket No. 21.

I. Summary Judgment Standards

Summary judgment is appropriate only if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(c). "In this regard, 'material' means that a contested fact has the potential to change the outcome of the suit under the governing law if the dispute is resolved favorably to the nonmovant. By like token, 'genuine' means that 'the evidence about the fact is such that a reasonable jury could resolve the point in favor of the nonmoving party . . . .'" *McCarthy v. Northwest Airlines, Inc.*, 56 F.3d 313, 315 (1st Cir. 1995) (citations omitted). The party moving for summary judgment must demonstrate an absence of evidence to support the nonmoving party's case. *Celotex Corp. v. Catrett*, 477 U.S. 317, 325 (1986). In determining whether this burden is met, the court must view the record in the light most favorable to the nonmoving party and "give the party the benefit of all reasonable inferences to be drawn in its favor." *Ortega-Rosario v. Alvarado-Ortiz*, 917 F.2d 71, 73 (1st Cir. 1990). Once the moving party has made a preliminary showing that no genuine issue of material fact exists, "the nonmovant must contradict the showing by pointing to specific facts demonstrating that there is, indeed, a trialworthy issue." *National Amusements, Inc. v. Town of Dedham*, 43 F.3d 731, 735 (1st Cir.) (citing *Celotex*, 477 U.S. at 324), *cert. denied*, 132 L. Ed. 2d 255 (1995); Fed. R. Civ. P. 56(e). "This is especially true in respect to claims or issues on which the nonmovant bears the burden of proof." *International Assn. of Machinists & Aerospace Workers v. Winship Green Nursing Ctr.*, 103 F.3d 196, 200 (1st Cir. 1996) (citations omitted).

II. Factual Background

The summary judgment record establishes the following undisputed facts. The plaintiff has been employed by Tennford since 1987. Deposition of Jenise Martin ("Plaintiff's Dep."), Attachment 1 to Tennford's Statement of Uncontested Facts in Support of Motion for Summary Judgment ("Tennford's SMF") (part of Docket No. 22), at 38. Since this action was filed, she has been promoted. *Id*. at 110-11. Tennford's business involves weaving labels for items of clothing in a plant located in Sanford, Maine. Affidavit of Stanley Smith ("Smith Aff."), Attachment 4 to Tennford's SMF, ¶ 2. In 1991 the plaintiff was assigned to the first shift in the weaving room; the foreman for this shift was Estes. Plaintiff's Dep. at 53; Smith Aff. ¶¶ 4-5.

The plaintiff asserts that Estes would frequently stand close to her and rub her breast with his elbow; he would also brush her buttocks with the back of his hand. Plaintiff's Dep. at 50-53, 82; Affidavit of Jenise Martin ("Plaintiff's Aff.") (Docket No. 28)[2] ¶ 2. At the time of the events alleged by the plaintiff, Tennford had in effect a written policy against sexual harassment that, *inter alia*, directed employees to report any such harassment to their foreman, to Stanley Smith, manager of the Sanford plant, or to Sally Clark, officer manager at the plant. Smith Aff. ¶¶ 1,7-8. The plaintiff first complained of sexual harassment by Estes in an oral statement to Clark on December 7, 1995; on December 8, 1995 she made this complaint in writing to Smith. Plaintiff's Dep. at 73;

[2] Tennford objects to the affidavits of the plaintiff, her counsel (Docket No. 29), Andre Lemieux (Docket No. 27) and Cindy Munroe (Docket No. 26), all of which were submitted by the plaintiff in opposition to Tennford's motion for summary judgment, on the grounds that they fail to comply with Fed. R. Civ. P. 56(e) because the jurat for each affidavit states that it is made on information and belief, rather than personal knowledge. Both the plaintiff and her counsel state in the first paragraph of their respective affidavits that they are made on personal knowledge. That statement satisfies the requirement of the rule, although it does not excuse inconsistencies or other violations of evidentiary rules within the affidavit, and is not overridden by the inconsistent jurat. To the extent that I rely on any factual statements made in the remaining two affidavits, which lack such a statement, I do so only to the extent it is clear that those statements are based on the affiant's personal knowledge.

Smith Aff. ¶¶ 10-11 & Exh. B. The incident about which the plaintiff complained occurred in September 1995. Plaintiff's Dep. at 60-68.

Smith spoke with Estes, who denied harassing the plaintiff. Deposition of Robert Estes, Attachment 2 to Tennford's SMF, at 34; Smith Aff. ¶ 14. Smith also spoke with several other female employees. Smith Aff. ¶ 20. Smith then moved Estes from his position as foreman to a job in maintenance in areas of the plant away from the weave room. *Id*. ¶ 21. Estes' employment was terminated in August 1996. *Id*. The plaintiff agrees that Estes did nothing inappropriate to her after September 1995. Plaintiff's Dep. at 64.

The plaintiff filed a complaint with the Maine Human Rights Commission concerning the Estes harassment on December 8, 1995. Affidavit of Ronald R. Coles ("Coles Aff.") (Docket No. 29) ¶ 2 & Exh. C to Smith Aff. After this action was filed, she filed another complaint with the Commission, alleging retaliation for the filing of the first complaint. Smith Aff. ¶ 28 & Exh. D. That complaint is still pending. *Id.*

III. Analysis

A. Tennford's Motion

Tennford asserts that there is no evidence that it had the required notice of Estes' harassment and, in the alternative, that it took appropriate remedial action when informed of the plaintiff's complaint. It also argues that evidence of any incidents occurring before February 14, 1995 may not be considered for any purpose under 42 U.S.C. § 2000e-5(e)(1), that there is no evidentiary support for the claim of retaliation, that the claims should be barred by the plaintiff's failure to exhaust her administrative remedies, and that it is not liable to the plaintiff for punitive damages. The parties

agree that the analysis of the federal claim and the claim under the Maine Human Rights Act is the same. *Weeks v. State of Maine*, 866 F. Supp. 601, 603 n.2 (D. Me. 1994); *Bowen v. Department of Human Servs.*, 606 A.2d 1051, 1053 (Me. 1992).

1. Hostile Environment

Conceding for purposes of its motion for summary judgment that the conduct of Estes alleged by the plaintiff was sufficient to create a hostile working environment, Tennford asserts that it did not know or have reason to know that he was harassing the plaintiff until she made her written complaint in December 1995. Thus, in this scenario, only the fifth element of proof of a hostile environment claim is at issue on this motion. *See Brown v. Hot, Sexy, & Safer Prods., Inc.*, 68 F.3d 525, 540 (1st Cir. 1995) (setting out elements of claim). An employer is liable for hostile environment sexual harassment by its employees only if "an official representing the institution knew, or in the exercise of reasonable care, should have known, of the harassment's occurrence, *unless* that official can show that he or she took appropriate steps to halt it." *Duplessis v. Training & Dev. Corp.*, 835 F. Supp. 671, 677 (D. Me. 1993) (emphasis in original), quoting *Lipsett v. University of Puerto Rico*, 864 F.2d 881, 901 (1st Cir. 1988).

The plaintiff first argues that Estes, as a supervisor, obviously had knowledge of the harassment, because he was the harasser, and that that knowledge is imputed to the employer, relying on *Harris v. International Paper Co.*, 765 F. Supp. 1509, 1516 (D. Me. 1991).[3] However, imputing the knowledge of the harasser to the employer in effect makes the employer strictly liable. In *Harris*

[3] The plaintiff also relies on *Perkins v. Champion Int'l Corp.*, No. 95-249-B (D. Me. 1997), but unreported cases may not be cited as authority in unrelated cases in this district. *Bachelder v. Communications Satellite Corp.*, 837 F.2d 519, 523 n.5 (1st Cir. 1988).

supervisors other than those personally involved in the racial harassment of the plaintiffs knew or should have known of the harassment. 765 F. Supp. at 1518, 1519-21. Employers are not automatically liable for sexual harassment by their supervisors. *Meritor Sav. Bank, FSB v. Vinson*, 477 U. S. 57, 72 (1986). The plaintiff will have to offer something more in order to establish the employer's liability in this case.

In the alternative, the plaintiff argues that knowledge of Estes' harassment can be imputed to Tennford because Tennford delegated to Estes the responsibility for handling complaints of sexual harassment, and Estes failed to fulfill this responsibility. She relies on the definition of "non-delegable duty" in the Restatement (Second) of Agency to support this argument, and asserts that Tennford's written Sexual Harassment Policy makes Estes a person "specifically designated" by Tennford to receive and respond to complaints of sexual harassment. The Policy, Exhibit A to the Smith Affidavit, provides, in relevant part:

> Any employee should report conduct of an intimidating, harassing or offensive nature to his/her supervisor, or, if preferred, to the location personnel representative or to the director, personnel. You are assured that your employment status will not be jeopardized by having made such a complaint and that such complaint will be promptly and thoroughly investigated.
>
> * * * * *
>
> The employee is responsible for informing the individual who is behaving in a harassing manner that his/her actions are unwelcome. If the behavior continues, the employee should inform the management of Tennford Weaving to allow the company to fulfill its commitment of providing a workplace free from harassment.

Smith Aff., Exh. A at [1]-[2]. The plaintiff quotes only the first two sentences and maintains that, since Tennford did not have a "location personnel representative" or a "director, personnel" at its Sanford plant, Plaintiff's Aff. ¶ 12, Tennford had delegated its duty to receive and resolve complaints

of sexual harassment to its supervisory employees. Estes was the plaintiff's supervisor.

The Restatement definition of a "non-delegable duty" states that these words "describe duties the performance of which can properly be delegated to another person, but subject to the condition that liability follows if the person to whom the performance is delegated acts improperly with respect to it." Restatement (Second) of Agency, ch. 14, top. 4, tit. C., intro. note. Asserting that an employer's duty to "field and respond to sexual harassment complaints is non-delegable," Plaintiff's Memorandum in Opposition to Defendant's Motion for Summary Judgment (Docket No. 30) at 6, the plaintiff concludes that Tennford is directly liable for Estes' harassment of her.

Assuming *arguendo* that the plaintiff's evaluation of Tennford's duty is correct, the argument ignores the undisputed facts that the plaintiff was aware that she could make a complaint of sexual harassment pursuant to Tennford's policy to Smith, the plant manager, or Clark, the office manager, as well as to her supervisor, Plaintiff's Dep. at 72, Smith Aff. ¶ 7, and that the policy does not delegate the responsibility for responding to complaints to supervisory employees. In addition, this theory would also make the employer strictly liable for sexual harassment by its supervisory employees, a result inconsistent with *Meritor* and authority from other circuits. *E.g.*, *Splunge v. Shoney's, Inc.*, 97 F.3d 488, 490 (11th Cir. 1996); *Bouton v. BMW of No. Am., Inc.*, 29 F.3d 103, 107 (3d Cir. 1994).

As her next salvo on the issue of Tennford's notice, the plaintiff raises four instances of alleged harassment of other female employees by Estes[4] occurring prior to February 14, 1995, the date before which Tennford claims the applicable statute of limitations bars any evidence. These

[4] The plaintiff offers no evidence that she informed Tennford of any instance in which Estes sexually harassed her before the December 1995 report.

incidents are: (1) in 1989 Roger Savoie, one of the supervisors in the plant, told Smith that Diane Stumpf, an employee, had complained to him that Estes would go behind the looms and stare at her; Smith moved Stumpf to another job in another part of the plant, Deposition of Roger J. Savoie[5] at 113-15, 123; (2) in May 1990 Andre Lemieux informed Smith that a female employee whom he did not name had complained to him that Estes had touched her breast and had moved to continue the contact when she attempted to move away, Affidavit of Andre Lemieux (Docket No. 27) ¶¶ 5 (last sentence) & 6 (sentences 1-2) & attached exhibit, although Smith denies that Lemieux identified Estes as the harasser, Deposition of Stanley A. Smith ("Smith Dep.") at 64-65; (3) in 1991 Samantha Cole, a first shift worker, reported to Smith that Estes "would lean against [her] breast and move his elbow and it made [her] very uncomfortable and [she] wanted it to stop," Deposition of Samantha Cole ("Cole Dep.") at 103, an alleged conversation which Smith testified "never happened," Smith Dep. at 44; and (4) in November 1994 Cole complained to Smith that Estes was rubbing up against her, Cole Dep. at 108.[6] After the fourth incident, Smith spoke with the plaintiff, who said, when asked by Smith if Estes had been touching her inappropriately, that she "didn't want to get involved." Smith Dep. at 75. Smith also spoke with two other male supervisors and Estes. *Id*. at 77. Smith told Estes to have no physical contact with female employees "from this day on," and that he would have to be discharged if it happened again. *Id.* at 78-79. Estes then stopped the unwanted

[5] Copies of the referenced portions of this and other depositions may be found in an undocketed compilation of deposition excerpts in the case file unless otherwise indicated.

[6] The plaintiff also refers to a discussion between Smith and an assistant supervisor in 1992 or 1993 as indicative of notice, but the only evidence she provides concerning this conversation is inadmissible hearsay, Plaintiff's Aff. ¶ 7, which, having been objected to, may not be considered on a motion for summary judgment. *Reed Paper Co. v. Proctor & Gamble Distrib. Co.*, 807 F. Supp. 840, 846 (D. Me. 1992).

touching and Cole thanked Smith for making Estes stop. Deposition of Samantha Cole, Excerpt attached to Tennford's Reply Memorandum to Plaintiff's Opposition to Motion for Summary Judgment ("Tennford's Reply Memorandum") (Docket No. 35), at 66. The plaintiff states that Estes began touching her breast and buttocks in 1990, although she told him not to do so, and that this activity continued until September 1995. Plaintiff's Aff. ¶ 2.

Tennford argues that evidence of sexually harassing conduct occurring more than 300 days before the plaintiff filed her complaint with the Maine Human Rights Commission is inadmissible for any purpose other than an attempt to show a systemic violation or serial violations of the statute. Tennford does not suggest that evidence of Estes' alleged identical harassment of other female employees is not admissible, and it is clear that such evidence is relevant to a claim of hostile environment sexual discrimination. *E.g., Ward v. Johns Hopkins Univ.*, 861 F. Supp. 367, 377 (D. Md. 1994). In this circuit, past acts constitute relevant background evidence even in the absence of a continuing violation theory. *Sabree v. United Bhd. of Carpenters & Joiners*, 921 F.2d 396, 400 n.9 (1st Cir. 1990). Therefore, evidence of events occurring before February 14, 1995, if otherwise admissible, is not barred from consideration by the court in connection with Tennford's summary judgment motion.

Morrison v. Carleton Woolen Mills, Inc., 108 F.3d 429 (1st Cir. 1997), provides sufficient guidance for resolution of the notice and continuing violation issues on the motion at issue here. In that case, the plaintiff did not complain of the harassment during the limitations period, although she had suffered from the harassment for several years. *Id.* at 438. Nevertheless, the First Circuit upheld the finding of the trial court that the hostile environment had existed for a number of years prior to the limitations date, allowing the plaintiff to recover for such conduct because the "systemic

violation" continued into the limitations period. *Id.* Here, there is no dispute that the final act by Estes of which the plaintiff complains took place within the limitations period and that it was identical to conduct alleged by the plaintiff to have occurred for five years before the limitations period. In *Morrison*, the plaintiff introduced evidence that seven female employees had filed a grievance against the supervisor whom the plaintiff identified as her harasser some five years before the plaintiff filed her claim. *Id.* at 433, 438. The plaintiff attempted to complain about her harasser to the employer's personnel manager twice between the spring of 1990 and the fall of 1991 but was turned away, *id.* at 434; the limitations period began on June 27, 1991, *id.* at 438. This is the only evidence reported in *Morrison* other than evidence of repeated harassment of the plaintiff, which was not made known to the employer until she filed her complaint on April 23, 1992. *Id.* This evidence was sufficient to allow the plaintiff in *Morrison* to recover for a systemic violation. Tennford attempts to distinguish *Morrison* with the single conclusory statement that the situation there was different "both in kind and magnitude from this case." Tennford's Motion for Summary Judgment (part of Docket No. 22) at 7. Such differences are not apparent to me. The plaintiff's evidence here is sufficient to survive a motion for summary judgment.[7]

Tennford next asserts that the plaintiff should be barred from asserting any claim other than that based on the September 1995 incident because she did not report existing harassment by Estes when questioned by Smith in 1994 concerning Cole's complaint that Estes had touched Cole inappropriately. Tennford cites no authority for this argument. The plaintiff did not state that Estes

[7] Tennford also argues that the plaintiff may not assert a serial violation because she knew her rights and failed to assert them, citing *Sabree*, 921 F.2d at 402. The support provided for this argument in Tennford's SMF, ¶¶ 9-10, that the plaintiff had known about sexual harassment for years and knew that she could make a complaint to Smith or Clark, is insufficient to foreclose the plaintiff's claim at the summary judgment stage of the proceedings.

was not engaging in unwelcome touching, but merely that she "did not want to get involved." Smith Dep. at 75. "The very nature of sexual harassment inhibits its victims from coming forward because of fear of retaliation." *Hansel v. Public Serv. Co. of Colorado*, 778 F. Supp. 1126, 1133 (D. Colo. 1991). Tennford may not escape liability for a continuing or systemic violation merely because the victim could have reported it sooner.

Tennford also invites this court to make new law by holding that the filing of a complaint with the Maine Human Rights Commission, with a check mark in the box next to the statement "I also want this charge filed with the EEOC," Exh. A to Coles Aff., is insufficient to constitute filing with the EEOC and, therefore, the plaintiff has failed to exhaust her administrative remedies. This, Tennford asserts, means that the plaintiff has failed to meet the requirements of an unspecified section of the applicable federal statute. *EEOC v. Green*, 76 F.3d 19, 23 (1st Cir. 1996), upon which Tennford relies in this regard, merely stated in *dicta* that, while a state agency and the EEOC can agree in writing that state proceedings will be automatically initiated when the EEOC receives a plaintiff's complaint, it was unclear from the particular agreement between EEOC and the Massachusetts agency that such a result was intended. That is a far cry from foreclosing a complainant who relies on the form provided by the state agency from bringing a claim in court after receiving a "right to sue" letter from the EEOC, Coles Aff. ¶ 5, because she did not also file a separate complaint directly with the EEOC. The plaintiff's filing with the EEOC was adequate.

Finally, Tennford addresses the final element of a hostile working environment discrimination claim by arguing that its response to the plaintiff's December 1995 complaint about Estes was sufficient as a matter of law to require entry of summary judgment on its behalf because Estes never harassed the plaintiff again, and Estes was terminated, several months later, for lack of

work in the position to which he was transferred. Plaintiff's Dep. at 64; Smith Dep. at 120. This argument is applicable to a scenario in which only the December 1995 complaint, and the incidents of harassment which it encompasses, are before the court. Because the plaintiff has made a showing of a systemic or continuing violation sufficient to survive summary judgment, the adequacy of Tennford's response to other complaints is also at issue. There are disputed issues of material fact on this point.

Tennford's request that the court limit damages available to the plaintiff to conduct occurring after November 21, 1991, the effective date of the Civil Rights Act of 1991, is more appropriately addressed by means of a motion *in limine* prior to trial. The extent of the relief available to the plaintiff on her state-law claim, to the extent that it differs from that available on the federal claim, should also be raised by motion *in limine*.

2. Retaliation

The plaintiff includes a claim for retaliation in her complaint. Although embodied in her Count I claim for violation of the federal statute, this claim is separate and distinct from the plaintiff's hostile environment claim. *Ruffino v. State St. Bank & Trust Co.*, 908 F. Supp. 1019, 1040 (D. Mass. 1995). The parties have briefed this issue separately, although neither side identifies the statutory basis for the claim. The statute prohibiting retaliation against an employee who files a charge of discrimination is 42 U.S.C. § 2000e-3(a). To establish a prima facie case under this statute, a plaintiff must show that she engaged in a protected action as an employee, that she subsequently suffered an adverse employment action, and that there was a causal connection between the protected activity and the adverse action. *Wyatt v. City of Boston*, 35 F.3d 13, 15 (1st Cir. 1994).

An adverse employment action "must . . ., at a minimum, impair or potentially impair the plaintiff's employment in some cognizable manner." *Nelson v. University of Maine Sys.*, 923 F. Supp. 275, 281 (D. Me. 1996).

The plaintiff offers evidence of only one instance which she characterizes as retaliation in her SMF. She asserts that Smith told her in 1996 that, as a result of the plaintiff's complaint, Tennford's legal bills were "outrageous" and could "kill the company." Plaintiff's Aff. ¶ 8. The plaintiff "felt that comment was designed to intimidate [her]." *Id*. She also relies on the testimony of supervisor Savoie that Smith twice said to him that the lawyers handling the plaintiff's claim were costing a lot of money and "we don't know if we can survive." Savoie Dep. at 142-43. An actionable retaliation claim requires more than mere criticism of an employee. *Nelson*, 923 F. Supp. at 282. To constitute adverse employment action, disparaging remarks "must significantly impair the employee's ability to function in [her] position." *Id.*, quoting *Fausto v. Welch*, 1994 WL 568846, *7 (D. Mass. 1994). Smith's reported remarks, if they can be construed as disparaging to the plaintiff, did not significantly impair her ability to function. To the contrary, she has been promoted and continues to be a "valued employee." Smith Aff. ¶ 26. A letter of reprimand was found not to constitute adverse action in *Nelson*, 923 F. Supp. at 282; Smith's remark is decidedly less serious than such a formal action by the employer.

Based on the summary judgment record, Tennford is entitled to summary judgment on the plaintiff's claim of retaliation.[8]

[8] The lack of evidence of an adverse employment action in the summary judgment record makes it unnecessary for the court to consider Tennford's procedural argument that the plaintiff's filing of a separate claim for retaliation with the Maine Human Rights Commission, a claim which has not yet been resolved, means that she has failed to exhaust her administrative remedies as to this (continued...)

B. Estes' Motion

1. Procedural Issue

Estes asserts that an individual defendant may not be held liable for employment discrimination, as a matter of law, under the Maine Human Rights Act ("MHRA") and the Maine Civil Rights Act ("MCRA"). The plaintiff responds that Estes is precluded from raising this argument on summary judgment by the doctrine of law of the case. Estes raised essentially the same argument, in addition to arguments addressed to another count, in a motion to dismiss. Docket No. 7. The court granted Estes' motion as to Count I of the complaint, which asserted a federal claim against Estes under 42 U.S.C. § 2000e-5(f), also known as Title VII. Docket No. 12. The motion was denied in all other respects without discussion. *Id*. The plaintiff contends that this denial precludes any consideration of Estes' motion for summary judgment on Counts II and IV. In this regard, the plaintiff relies on *United States v. Connell*, 6 F.3d 27, 30 (1st Cir. 1993).

Connell, a criminal case, is distinguishable. There, the defendant sought reconsideration of his sentence, some seven months after final judgment was entered on his sentence following remand from the appellate court. 6 F.3d at 29. In this motion he raised, for the first time, a complaint about an order concerning a portion of his sentence. The First Circuit denied the appeal from the denial of the motion for reconsideration on the grounds that a legal decision unchallenged on appeal despite the existence of opportunity to do so becomes law of the case for future stages of the same litigation, after remand. *Id*. at 30. Here, there has been no appeal. Fed. R. Civ. P. 54(b) provides, in relevant

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[8](...continued)
claim.

part: "[A]ny order . . .which adjudicates fewer than all the claims . . . is subject to revision at any time before the entry of judgment adjudicating all the claims and the rights and liabilities of all the parties." A motion for summary judgment is not the same as a motion to dismiss. Even if a ruling on the motion for summary judgment were to be construed as a revision of the ruling on the motion to dismiss, however, Rule 54(b) makes clear that there is no bar to such action by the court. *See generally Union Mut. Life Ins. Co. v. Chrysler Corp*., 793 F.2d 1, 15 (1st Cir. 1986). Estes' motion for summary judgment may properly be considered by the court.

2. Substantive Issues

As to the claim under the MHRA, this court has determined that an individual supervisor is not subject to suit under the MHRA. *Quiron v. L.N. Violette Co.*, 897 F. Supp. 18, 19-20 (D. Me. 1995); *Caldwell v. Federal Express Corp.*, 908 F. Supp. 29, 36 (D. Me. 1995). The plaintiff does not address this count in her opposition to Estes' motion for summary judgment. Estes is entitled to summary judgment on Count II of the complaint.

An individual may be held liable under the MCRA, however. *State v. DeCoster*, 653 A.2d 891, 895 (Me. 1995). The defendant relies on *LaPlante v. United Parcel Serv., Inc*., 810 F. Supp. 19, 22-23 (D. Me. 1993), to argue that the MCRA cannot support a claim also brought under the MHRA and 42 U.S.C § 2000e-5. *LaPlante* did not involve a claim against an individual defendant. In *LaPlante* the plaintiff sued her former employer under Title VII, the MRHA and the MCRA for sexual harassment, discrimination and constructive discharge. *Id*. at 20. The court held that, under the circumstances of that case, the only rights that the MCRA could enforce were those created by

either Title VII or the MHRA, making the MCRA unavailable to the plaintiff as a legal basis for liability. *Id*. at 22-23 & n.7.

The plaintiff asserts that *LaPlante* is distinguishable from the instant case due to the enactment of 5 M.R.S.A. § 4684-A in 1993, after *LaPlante* was decided. This section of the MCRA, she argues, creates a right independent of those created by the federal statute and the MHRA, making the analysis in *LaPlante* — that the MCRA is designed only to provide a remedy for rights created by some other law — no longer valid. Section 4684-A does appear to create a right: "[A] person has the right to engage in lawful activities without being subject to physical force or violence . . . or the threat of physical force or violence . . . motivated by reason of race, color, religion, sex, ancestry, national origin, physical or mental disability or sexual orientation." Assuming without deciding that section 4684-A creates a right for which the MCRA itself provides a remedy, the question then becomes whether the unwelcome touching of the plaintiff's breasts and buttocks by Estes constituted the use of physical force or violence.[9]

Estes asserts that he is entitled to summary judgment because the plaintiff has made no allegation that actual force or violence was used, citing *Caldwell,* 908 F. Supp. at 32. The plaintiff responds that any unwelcome touching constitutes the use of force,[10] relying on *State v. Smith*, 306 A.2d 5, 7 (Me. 1973) (defining "force" for purposes of criminal statute defining assault and battery as any unlawful touching of the person of another) and case law from other jurisdictions. The

[9] The plaintiff conceded at her deposition that Estes had not threatened her with the use of force or violence. Plaintiff's Deposition, Excerpt attached to Estes' Statement of Uncontested Facts in Support of Motion for Summary Judgment (Docket No. 33), at 148-50.

[10] The plaintiff appears to concede by her argument that Estes' actions did not involve violence.

MCRA includes no definition of either term. The statute construed in *Smith* has since been repealed. The criminal assault statute in effect when the MCRA was enacted, and still in effect today, 17-A M.R.S.A. § 207(1), has been construed by the Law Court to

> bifurcate[] the crime into two separate varieties of unlawful conduct, 1) conduct causing only an offensive physical contact to another, such as the knowingly intended bodily contact or unlawful touching done in such a manner as would reasonably be expected to violate the person or dignity of the victim and 2) the knowingly intended use of unlawful force against another causing bodily injury as statutorily defined.

State v. Griffin, 459 A.2d 1086, 1091 (Me. 1983) (citations omitted). Thus, under Maine criminal law, every offensive or unlawful touching does not necessarily involve the use of force.

The words "force" and "violence" were present in the MCRA before the addition of section 4684-A, used in an identical manner. 5 M.R.S.A. § 4682. The MCRA "grew out of concern about incidents of racism and bigotry." *Phelps v. President & Trustees of Colby College*, 595 A.2d 403, 407 (Me. 1991) (declining to extend coverage of the MCRA to claim of violation of First Amendment right of free speech). The fact that a plaintiff subjected to unwelcome touching is not without other remedies against the person who does the touching also bears on the analysis of this issue. "[T]he Maine Civil Rights Act is clearly a statute designed to provide relief when none is otherwise available." *LaPlante*, 810 F. Supp. at 23. The "force" contemplated by the MCRA must involve something more than unwelcome touching, no matter how offensive that touching may be. The case law from other jurisdictions offered by the plaintiff involves criminal charges of assault under the statutes of those jurisdictions and thus is of little utility here.

Because the summary judgment record contains no evidence that the plaintiff was subjected to physical force by Estes, he is entitled to summary judgment on the MCRA claim.

C. Punitive Damages

Tennford asserts that the plaintiff cannot meet the standard for an award of punitive damages on her federal claim.[11] That standard requires that the plaintiff show that Tennford engaged in a discriminatory practice with malice or with reckless indifference to her federally protected rights. 42 U.S.C. § 1981a(b). The plaintiff does not argue that Tennford had an actual intent to harm her. She focuses on the "reckless indifference" alternative.

While "evidence of sexual harassment directed at employees other than the plaintiff is relevant to show a hostile work environment," *Hall v. Gus Constr. Co.,* 842 F.2d 1010, 1015 (8th Cir. 1988) (citations omitted), it is reckless indifference to the rights of the individual plaintiff that justifies an award of punitive damages under section 1981a. The only evidence offered by the plaintiff concerning Smith's awareness of Estes' harassment of the plaintiff is her December 1995 complaint, after which Estes did not harass the plaintiff again. Smith undertook an investigation of that complaint and moved Estes to another job, away from the plaintiff and the weave room. Smith Aff. ¶¶ 22-23. The plaintiff argues that Smith's investigation was shoddy, but for purposes of a claim for punitive damages it is the outcome that matters. *See also Ayers v. Wal-Mart Stores, Inc.*, 941 F. Supp. 1163, 1170 (M.D.Fla. 1996) (reckless disregard cannot be established by belated reaction to employee's complaints).

In addition, the existence of a written policy prohibiting sexual harassment that was distributed to all employees, Smith Aff. ¶ 7 & Exh. A, "is at least prima facie evidence of awareness

[11] The plaintiff does not dispute Tennford's assertion that punitive damages are not available on her state-law claims. *Carey v. Mt. Desert Island Hosp.*, 910 F. Supp. 7, 13 (D. Me. 1995).

on the part of [the employer] of the federally protected rights" of its employees. *Patterson v. P.H.P. Healthcare Corp.*, 90 F.3d 927, 944 (5th Cir. 1996), *cert. denied* 117 S.Ct. 767 (1997). The plaintiff argues that Tennford should have done more to educate its supervisors, but cites no authority for the proposition that such a failing constitutes reckless disregard for the rights of an employee. I decline the plaintiff's invitation to recommend what appears from this record to be new law requiring an employer's sexual harassment policy to prevent sexual harassment of its employees by other employees or supervisors in order to avoid imposition of punitive damages. If this were the standard, employers would be strictly liable for the actions of employees who failed to comply with the policy. As discussed above, strict liability is not imposed on employers in sexual harassment cases.

The plaintiff also argues that punitive damages should be available because Estes, the harasser, was a member of Tennford's management, citing *Preston v. Income Producing Management, Inc.*, 871 F. Supp. 411 (D. Kan. 1994), and *Kimzey v. Wal-Mart Stores, Inc.*, 907 F. Supp. 1309 (W. D. Mo. 1995), *rev'd in part* 107 F.3d 568 (8th Cir. 1997). In support of this argument, the plaintiff asserts that shift supervisors, of which Estes was one, "are the top direct employee supervisors at Tennford and have the power to fire and discipline employees," and, "[w]hen Smith is not on the mill premises, the shift supervisor/foreman runs the mill." Plaintiff's SMF ¶¶ 2-3. The record evidence cited by the plaintiff to support these assertions does not in fact do so. Clark was between Smith and the shift supervisors in the plant hierarchy, Smith Dep. at 27, the supervisors would fire employees only when told to do so by "the office," Estes Deposition, Excerpt attached to Tennford's Reply Memorandum, at 14, and Estes disciplined employees by reporting them to Smith, *id.* at 17. This evidence does not establish a disputed issue of material fact concerning whether Estes was a member of Tennford management.

Finally, the plaintiff argues, based on Section 909 of the Restatement (Second) of Torts,[12] that Tennford may be liable for punitive damages because it was reckless in retaining Estes as an employee. That section of the Restatement has been adopted by at least one federal circuit court for guidance in interpreting 42 U.S.C. § 1891a when punitive damages are sought against the employer for conduct by an employee. *Fitzgerald v. Mountain States Tel. & Tel. Co.*, 68 F.3d 1257, 1263 (10th Cir. 1995); *but see Muratore v. M/S Scotia Prince*, 845 F.2d 347, 354-55 (1st Cir. 1988) (declining to adopt § 909 in admiralty case then before court). Beyond asserting that Tennford should have fired Estes after the Cole report in 1994, the plaintiff does not explain how Tennford was reckless in retaining Estes. Bearing in mind that negligence is not sufficient to support the imposition of punitive damages in this context, *Splunge*, 97 F.3d at 491, the admissible evidence in the summary judgment record concerning the reports made about Estes to Smith before the plaintiff's complaint does not rise to the level of reckless conduct by Tennford.

Tennford is entitled to summary judgment on the plaintiff's claim for punitive damages.

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[12] That section of the Restatement provides:

> Punitive damages can properly be awarded against a master or other principal because of an act by an agent if, but only if,
> (a) the principal or a managerial agent authorized the doing and the manner of the act, or
> (b) the agent was unfit and the principal or a managerial agent was reckless in employing or retaining him, or
> (c) the agent was employed in a managerial capacity and was acting in the scope of employment, or
> (d) the principal or a managerial agent of the principal ratified or approved the act.

Restatement (Second) of Torts § 909 (1977).

IV. Conclusion

For the foregoing reasons, I recommend that the motion of defendant Tennford be **GRANTED** as to the plaintiff's claims for unlawful retaliation and punitive damages, and otherwise **DENIED**; and that the motion of defendant Estes for summary judgment be **GRANTED**.

NOTICE

A party may file objections to those specified portions of a magistrate judge's report or proposed findings or recommended decisions entered pursuant to 28 U.S.C. § 636(b)(1)(B) for which de novo review by the district court is sought, together with a supporting memorandum, within ten (10) days after being served with a copy thereof. A responsive memorandum shall be filed within ten (10) days after the filing of the objection.

Failure to file a timely objection shall constitute a waiver of the right to de novo review by the district court and to appeal the district court's order.

Dated at Portland, Maine this 28th day of July, 1997.

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David M. Cohen
United States Magistrate Judge